IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV-2015-488-000019
[2017] NZHC 154

IN THE MATTER	of an application for review under Part 1 Judicature Amendment Act 1972
BETWEEN	OPUA COASTAL PRESERVATION INCORPORATED Plaintiff
AND	FAR NORTH DISTRICT COUNCIL First Defendant
	MINISTER OF CONSERVATION Second Defendant
	D C SCHMUCK Third Defendant

Hearing: 28 November 2016

Appearances: R Mark for Plaintiff
J G A Day for First Defendant
B Arapere for Second Defendant
J Brown and C Prendergast for Third Defendant

Judgment: 14 February 2017

JUDGMENT OF FOGARTY J

This judgment was delivered by Justice Fogarty
on 14 February 2017 at 4.00 pm
pursuant to r 11.5 of the High Court Rules
Registrar/Deputy Registrar

Date:……

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Introduction

[1] This case involves a judicial review of the exercise of powers under the Reserves Act 1977 by the Far North District Council (FNDC). The plaintiff (Opua Inc) challenges two decisions:

(a) A decision to grant "permission" to the third defendant to carry out private commercial boatyard activities on a local purpose (esplanade) reserve ("the Reserve"); and

(b) A later decision to grant the third defendant easements over the Reserve for the purpose of carrying out those activities.

[2] In these proceedings the plaintiff contends that both decisions were unlawful and should be reviewed to ensure that the statutory powers under the Reserves Act are exercised lawfully.

Overview of the Long-Running Dispute

[3] Opua is a beautiful little seaside settlement in the Bay of Islands. It is a popular destination for cruising yachts due to the sheltered and deep water anchorage. It is also popular due to the facilities available to the cruising community. There is a small bay in Opua called Walls Bay. The third defendant, Mr Schmuck, operates a boatyard there called "Doug's Opua Boatyard".

[4] This judicial review is the latest chapter in a 22-year dispute between individuals and factional community groups who are opposed to the boatyard and to the third defendant. The boatyard shed is on Mr Schmuck's private land, but is accessed by a slipway across the Reserve. Mr Schmuck has consents under the Resource Management Act 1991 (RMA) enabling him to operate this boatyard in accordance with that Act.

[5] At the request of all counsel I made a site inspection. As I have already mentioned, the location of this boatyard is in an idyllic part of New Zealand and in an idyllic part of that part. It presents as a small bay a few hundred metres in length;

a sunny bay with a northerly aspect. It has a footpath, which is part of a coastal walkway, formed more by wear than by machinery and below which is a small beach. A slipway runs from the water (Walls Bay) to a turntable which partly cuts into the bottom of Mr Schmuck's private property, but is otherwise at the southern, higher, end of the reserve. The slipway is capable of pulling yachts from the water to the turntable. At that point, there are canvas linings on the ground and a sump designed to capture water and other matter blasted off the hull during a hull cleaning operation. Cleaning and servicing boats is what Doug's Opua Boatyard does. It is a commercial operation taking place on the southern edge of the Reserve.

[6] The easements in issue in this proceeding allow access to, repair and maintenance of vessels standing on the southern slipway tram rail or on the turntable. The last two easements provide a general ability to discharge contaminants to air, soil and water and emission of noise. On my reading and understanding of the site and operations on the site, they are essentially catch-all easements which resolve any quibble as to whether or not the other easements sufficiently cover the operation of the boatyard on the slipway and on most of the turntable.

[7] If the easements survive this challenge, screens will be erected and more permanent measures will be put in place to improve the present situation, with the goal of containing all contaminants within the wash-down perimeter.

General Chronology of the Dispute

[8] There have been numerous decisions made over the Reserve in the course of the last 22 years. This case concerns only two decisions but the background to the dispute nonetheless forms an important part of the context for this judicial review.

[9] The boatyard commenced business on-site in 1966. In 1976 the former proprietor of the site obtained consent from the Bay of Islands County Council for the slipway. This was treated as an informal planning consent.

[10] In 1994, Mr Schmuck, along with his father, purchased the boatyard. At that time the property purchased was separated from the sea by an unformed Crown

Grant road. The land apparently had been set aside for Crown Grant road in 1883, as was typical at that time when a Queen's Chain was commonly set aside adjacent and inland of the mean high water mark.

[11] In 1998, the road was stopped and the Reserve was created. The intent of that reserve can be ascertained from the public notice appearing in the Northern News on 12 June 1997:

> Notice is hereby given that the Far North District Council proposes to stop portions of an unnamed and unformed road situated adjacent to the Bay of Islands Harbour and Dougs Boatyard … at Opua described in the schedule hereto. …
>
> The portions of road … once stopped are to become esplanade reserve and vest in the Far North District Council.
>
> After becoming esplanade reserve, the Far North District Council are proposing to grant an easement over Areas B and C on SO Plan 68634 in favour of the adjoining property known as Dougs Boatyard … (legal description follows).
>
> The proposal to grant Douglas Boatyard an easement … is to firstly legalise their occupation of the land and secondly to allow the boat yard to install discharge containment tanks on areas … which they are being required to do by the Northland Regional Council. The proposed easement area will exclude the area of land contained within the Opua to Paihia pedestrian walkway …
>
> All persons objecting to this proposal must lodge their objections in writing with … on or before 25 July 1997.

[12] In 1998 the road was stopped. The reserve was created, but Mr Schmuck did not get his easement. This was not for want of favour by the FNDC, who have always favoured the grant of an easement over parts of the reserve closely associated with the slipway.

[13] In 2000, the Minister of Conservation granted, but only in part, Mr Schmuck's easements. The Minister declined easements for wash-down, repair and maintenance on the ground that s 48(1) of the Reserves Act did not allow them to be made. That section provides:

> **48 Grants of rights of way and other easements**
>
> (1) Subject to subsection (2) and to the Resource Management Act 1991, in the case of reserves vested in an administering body, the

> administering body, with the consent of the Minister and on such conditions as the Minister thinks fit, may grant rights of way and other easements over any part of the reserve for—
>
> (a) any public purpose; or
>
> (b) providing access to any area included in an agreement, lease, or licence granted under the powers conferred by this Act; or
>
> (c) the distribution or transmission by pipeline of natural or manufactured gas, petroleum, biofuel, or geothermal energy; or
>
> (d) an electrical installation or work, as defined in section 2 of the Electricity Act 1992; or
>
> (e) the provision of water systems; or
>
> (f) providing or facilitating access or the supply of water to or the drainage of any other land not forming part of the reserve or for any other purpose connected with any such land.

[14] At around the same time, an Environment Court decision, dismissing Mr Schmuck's appeal against an abatement notice, made it clear that Mr Schmuck would need resource consents to continue with boating activities on the reserve.[1]

[15] Mr Schmuck's joint application for resource consents and easements was heard nearly two years later before Environment Court Judge LJ Newhook. On 31 January 2002, Judge Newhook, sitting alone (pursuant to s 279 of the RMA), made a consent order between the parties.[2] The appellants were Doug's Opua Boatyard, ET and MC Leeds and the Director General of Conservation. The respondents were the Northland Regional Council and the FNDC. The effect of the orders was to grant resource consents to the third defendant. The issue of easements over the Reserve remained outstanding.

[16] Come early 2005, Mr Schmuck lodged a fresh application, and its fate is the subject of this judicial review. Approximately 40 submissions were filed in support of the application and approximately 40 objections were filed against it. The hearing Commissioner, Mr Dormer, reported to the FNDC recommending it grant the easements sought by Mr Schmuck to regularise his current business. At the outset of his report, the Commissioner stated:

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1 *Schmuck v Far North District Council* EnvC Auckland A26/2000, 10 March 2000.

2 *Doug's Opua Boatyard v Northland Regional Council* EnvC Auckland, 31 January 2002.

> … almost of the objectors stressed that it was not their wish to close the boatyard down, merely to confine its operations.
>
> Thus, there was little if any opposition to the proposed easement enabling boats to be bought from the water to the boatyard, some opposition to the proposed "trap" and considerable opposition to the use of the slipway (area A) for working on boats and for access to the boats in the yard but very close to the site boundary (area B).

[17] On 9 March 2006, the FNDC resolved to grant the easements subject to the Minister's consent,[3] adopting Mr Dormer's recommendations in full. On the same day, the FNDC obtained the Minister of Conservation's consent for some, but not all, of the easements.

[18] On 27 August 2013, the Conservator decided to grant some further easements and decline others on the grounds that they were beyond the authority created in s 48 of the Reserves Act. That decision declined consent in respect of the following easements that had been sought:

> A. An easement over Sec 2 SO 68634 as shown on NRC map 3231b and Williams & King plan sheet no.03.11 to permit the following:
>
> 3. The construction and maintenance of a concrete wash-down area with associated discharge containment systems to be located above a line 10 metres above MHWS.
>
> 4. The washing down of boats prior to the boats being moved to the boatyard for repairs or maintenance or being returned to the water.
>
> 5. The erection of screens or the implementation of similar measures to contain all containments within the wash-down perimeter.
>
> 6. The repair or maintenance of any vessel which by virtue of its length or configuration is unable to be moved so that it is entirely within the adjacent boatyard property.
>
> C. An easement two metres wide over Secs 2 & 3 SO 68634 as shown on NRC map 3231b and shown as "Area B" on Williams & King plan sheet no. 03.11 to permit the following:
>
> Access to, and repair and maintenance of, any vessel standing on the southern slipway tram rail and/or the turntable.

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[3] As a matter of law, the FNDC decision had to be subject to the Minister's consent – see s 48(1) of the Reserves Act 1977 set out at [13] above.

D. An easement over Sections 1, 2, 3 & 4 SO 68634 as shown on NRC map 3231b and Williams & King plan sheet no.03.11 to permit the following:

1. The discharge of containments to air, soil and water in accordance with any relevant resource consent.

2. The emission of noise in accordance with any relevant resource consent.

E. That part of the easement which refers to Williams & King plan sheet No.03.11.

On the grounds that the easements are not capable of being authorised under the provisions of section 48 of the Reserves Act 1977.

[19] In May 2014, the Environment Court made declarations saying that the existing land use consents were still valid.[4] These were land use consents for the uses contemplated by the application for easements.

[20] Similarly to taking the opportunity to confirm his position under the RMA, Mr Schmuck went back to the Council for confirmation that he had its permission for the use he was making of the adjacent reserve. The Council decision recorded that the Department of Conservation, on 27 August 2013, had declined some of the easements and the recommendation to Council from the staff was as follows:

> In respect of the easements that were declined, it is recommended that the Council as landowner and administering body of the reserve simply gives permission for the use of the reserve for the activities authorised by the resource consents listed in the 2002 consent order. This will cover the purposes that were intended to be met by the declined easements. This would be a permission extended at the will of the Council which would not have the long-term certainty associated with easements but would enable the consented activities to proceed.

In summary:

> The recommendation is made on the grounds that it is lawful to do so and is reasonable and appropriate having regard to all the issues relating to Doug's Opua Boatyard and the adjacent esplanade reserve at Opua.

The formal recommendation was:

> THAT Council, in its capacity as landowner and administering body of the local purpose (esplanade) reserve which is located adjacent to the property

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4 *Schmuck v Far North District Council* [2014] NZEnvC 101.

known as "Doug's Opua Boatyard", grants permission to Doug's Opua Boatyard to undertake on that part of the reserve shown in dark grey on Thomson Survey Plan 8095 Rev. 1-05-13, the activities authorised by the resource consents listed within the Environment Court consent order dated 31 January 2012.

[21] That has come to be known as the 30 October decision.

[22] The problem was at the Minister's end due to legal advice he was receiving as to the correct interpretation of s 48 of the Reserves Act. On 5 February 2013 the FNDC wrote to the Northland Conservator of the Department of Conservation seeking a decision. That was not forthcoming and an application was then filed in the High Court by Mr Schmuck, citing as defendants the Director General, Department of Conservation, the Minister of Conservation and the FNDC, for the purposes of obtaining a High Court judgment on the scope of s 48.

[23] The matter came before Heath J. The following paragraphs from his Honour's judgment are relevant to this dispute:[5]

> [3] At the request of the parties, I directed that a preliminary question be argued before the substantive judicial review proceeding. The question was formulated as follows:
>
> > Whether section 48(1)(f) of the Reserves Act 1977 allows easements to be granted over a local purpose (esplanade) reserve for the following activities authorised by resource consents granted under the Resource Management Act 1991:
> >
> > (a) The construction and maintenance of a concrete wash down area with associated discharge containment system to be located above a line 10m above mean high water spring.
> >
> > (b) The washing down of boats prior to the boats being moved to the boatyard for repairs or maintenance or being returned to the water.
> >
> > (c) The erection of screens or the implementation of similar measures to contain all contaminants within the wash down perimeter.
> >
> > (d) The repair or maintenance of any vessel which by virtue of its length or configuration is unable to be moved so that it is entirely within the adjacent boatyard property.

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5 *Schmuck v Director General Department of Conservation* [2015] NZHC 422.

[24] Section 48(1)(f) addresses both particular reasons for requiring a right of way or easement and, through the adoption of an orthodox drafting technique, the possibility of rights of way or easements being required for some other purpose connected with land that does not form part of the reserve. It deals with four distinct situations, the common denominator of each being the need for a connection between the reserve land and land not forming part of the reserve:

(a) The provision or facilitation of access to other land not forming part of the reserve.

(b) The supply of water to any land not forming part of the reserve.

(c) The drainage of any land not forming part of the reserve.

(d) Any other purpose connected with land not forming part of the reserve.

[25] I reiterate the important distinction between the jurisdictional power to grant a right of way or easement and the discretion whether or not to allow one to be created. From a jurisdictional perspective, the focus is on the degree of connection between the dominant tenement (the land over which the easement extends) and the servient tenement (the land owned by the grantor of the right of way or easement). In this case, there is a physical connection. The Esplanade Reserve and the boatyard are contiguous parcels of land. That, in my view, is a sufficient connection, for the purposes of s 48(1)(f).

[31] For those reasons, I answer the question posed[34] in the affirmative. In summary, s 48(1)(f) of the Act allows easements to be granted over the Esplanade Reserve for the activities listed in the question that have already been authorised by resource consents granted under the Resource Management Act 1991.

[32] By consent, I quash the decision not to consent to the easements sought and make an order that the decision whether to consent to such easements be remitted back to the Minister for reconsideration, in light of observations made in this judgment. That order has the effect of determining this proceeding on a final basis.

[24] Following the decision of the High Court, on 7 April 2015 the FNDC received a letter from Nicola Douglas, Director Conservation Partnerships, Northern North Island which read as follows:

> I refer to the recent judgment of the High Court in Schmuck v Director-General of Conservation. The Court found that s 48(1)(f) Reserves Act 1977 allows easements of the kind sought by Mr Schmuck to be granted over local purpose (esplanade) reserves. It quashed the decision of the Minister's delegate to refuse consent under s 48(1)(f) and has remitted the decision

> back to the Minister (or her delegate) for reconsideration in light of observations made in the judgment.
>
> I am aware that the Minister's powers under s 48(1)(f) have been delegated to the Council as territorial authority and administering body of the reserve. In the circumstances I suggest that it is appropriate for the Council to exercise its own delegation under s 48 and make a decision on whether or not to grant the consents which Mr Schmuck seeks.
>
> With respect to the decision, you will be aware that the application must be considered on its merits. The Court did not determine that the easements must be granted, only that such easements could be granted under s 48 of the Reserves Act. You will also be aware that the council must reach its decision with an open mind and in accordance with administrative law principles.
>
> You should also note that there is a Treaty claim over the area and the Opua boatyard easements have been raised in the Waitangi Tribunal in the context of the Northland Inquiry. A reconsideration of the original decision will be likely therefore to attract some interest. Finally, the Council should also be aware that in making a decision under s 48 Reserves Act the Council, as delegate of the Minister of Conservation, is bound by s 4 Conservation Act. This requires the Council to give effect to Treaty principles.

[25] The information in the second paragraph of that letter is quite extraordinary. It will be recalled by the reader that s 48(1) empowers the administering body to grant rights of way in other easements "with the consent of the Minister and on such conditions as the Minister thinks fit". Section 10 of the Reserves Act provides for the delegation of the Minister's powers:

> **10 Delegation of Minister's powers**
>
> (1) The Minister may from time to time delegate any of his or her powers and functions under this Act (not being the power to approve any bylaw) to any individual, committee, body, local authority, or organisation, or to any officer or officers of the Department specified by the Minister, either as to matters within his or her jurisdiction generally, or in any particular case or matter, or any particular class of cases or matters, or in respect of any reserve or reserves.
>
> (2) The officer or officers referred to in subsection (1) may be an officer or officers referred to by name or the officer or officers who for the time being and from time to time hold specified positions in the Department.
>
> (3) Subject to any general or special directions given by the Minister, any person, committee, body, local authority, organisation, or officer to which or to whom any powers have been so delegated may exercise those powers in the same manner and with the same effect as if they had been directly conferred on that person, committee, body, local authority, organisation, or officer by this Act and not by delegation.

> (4) Every person, committee, body, local authority, organisation, or officer purporting to act under any delegation under this section shall, in the absence of proof to the contrary, be presumed to be acting within the terms of the delegation.
>
> (5) Any such delegation may at any time be revoked by the Minister in whole or in any part, but that revocation shall not affect in any way anything done under the delegated authority.
>
> (6) No such delegation shall prevent the exercise by the Minister himself or herself of any of the powers and functions conferred on him or her by this Act.

[26] In June 2013 the Minister made a general decision applicable across New Zealand that that power of consent reserved under s 48(1)(f) be delegated to the relevant territorial authority and administering body of the reserve. The logic behind this was explained at the time that the Minister's role was not as a primary fact-finding body or decision-maker, but simply a check upon those powers, which were vested in the relevant Territorial Local Authority. The effect of the delegation was explained in a letter from the Department of Conservation, notifying New Zealand's local authorities of the delegation:

> These delegations extend the scope of the existing powers by removing the previous limitations and conditions and they include some additional delegations. It is envisaged they will better enable local authorities to make decisions affecting reserves and are in accordance with the spirit of the changes taking place within the Department of Conservation with an emphasis on conservation with communities.
>
> Local authorities will now be able to consider consent applications that previously had to be referred to the Department of Conservation for the consent of the Minister or the Minister's delegate, for matters such as the granting of leases, licences or easements over council vested reserves.

[27] In response to the letter of 7 April 2015,[6] the FNDC obtained a staff report reconsidering its decision to decline some of the easements on jurisdictional grounds. They were upheld as capable of being authorised by Heath J in the High Court, a decision which was not appealed.

[28] On 5 June 2015, the FNDC resolved to grant the easements which had been declined by the Department of Conservation on 27 August 2013.

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6 See above at [24].

[29] In the meantime, in February 2015, Opua had begun judicial review proceedings. It sought to review the "land owner permission", granted by FNDC to Mr Schmuck to use the reserve on 30 October. This judicial review was subsequently amended to include the decision by the FNDC (as delegate of the Minister of Conservation) resolving to approve on behalf of the Minister grants of the remaining easements made by itself as the administering body back on 9 March 2006.

First Cause of Action: Review of the 30 October 2014 Decision

[30] On 30 October 2014 the first defendant resolved:

> That Council in its capacity as landowner and administering body of the Local Purpose (Esplanade Reserve) which is located adjacent to the property known as Doug's Opua Boatyard, grants permission to Doug's Opua Boatyard to undertake on that part of the Reserve shown in dark grey on Thomson Survey Plan 8095 Rev. 1-05-13, the activities authorised by the Resource Consents listed within the Environment Court Consent Order dated 31 January 2002. ("decision").

[31] The first defendant gave as its reasons for the decision:

> The decision is made on the grounds that it is lawful to do so and is reasonable and appropriate having regard to all of the issues in regard to Doug's Opua Boatyard and the adjacent Esplanade Reserve in Opua.

[32] The pleaded grounds for review are that the Council was purporting to exercise a statutory power which it did not have and in making the decision, the FNDC exceeded the statutory powers under the Reserves Act. Opua also pleads a failure to consult with local iwi and that the FNDC has made significant changes to the Management Plan without public consultation. It also pleads that the FNDC took into account irrelevant considerations and failed to take into account relevant considerations. Opua submits that the irrelevant considerations were that the FNDC saw it as sufficient that the boatyard had existing use rights and resource consents and this was enough to grant permission. FNDC also took into account use of the property for over 20 years.

[33] The principal argument by the defence was that the FNDC, as owner of the land, was simply granting permission for the activities of the boatyard.

[34] In my view, it is not necessary to take the particulars of the pleadings, item by item, and analyse them. In my view, there was a clear absence of statutory or any other authority on the part of the FNDC in granting permission so simply to Mr Schmuck to continue his activities. The FNDC does not have any common law rights of ownership which conflict with the reason it is the owner of the land; namely that the land is a reserve created by statute. Rather than approaching the FNDC as the owner of the land, the more analogous approach to common law principle is to see that the FNDC hold the land in a status akin to a trustee for the purpose at all times of advancing the goals of the Reserves Act.

[35] In that Act, as we have seen, under s 48(1) the administering body (in this case the FNDC) may grant easements over any parts of the reserve. The administering body has confined responsibilities. Section 40(1) provides:

> **40 Functions of administering body**
>
> (1) The administering body shall be charged with the duty of administering, managing, and controlling the reserve under its control and management in accordance with the appropriate provisions of this Act and in terms of its appointment and the means at its disposal, so as to ensure the use, enjoyment, development, maintenance, protection, and preservation, as the case may require, of the reserve for the purpose for which it is classified.

[36] Section 40 both enables grants of rights of way and other easements, and limits such grants by the conditions and considerations contained within it.

[37] As was argued by the defendants, the FNDC purported to be exercising a simple right of ownership in granting permission. The FNDC does not have a simple right of ownership.

[38] Plainly the FNDC was trying to give practical effect to the consents that had been obtained under the RMA by providing some comfort to Mr Schmuck that he would not be prosecuted for taking advantage of those consents. But the FNDC was exercising a power it did not have. It holds the land as owner only for the purpose "to ensure the use, enjoyment, development, maintenance, protection and preservation as the case may require of the reserve for the purpose for which it is classified". It remains constrained by that unless, pursuant to s 48 of the Reserves

Act, there is carved out an easement right, which will only be done within the limited scope of s 48(1).

[39] The FNDC in defence argued that it was exercising the powers contained in s 61(1), which provides:

> **61 Powers (including leasing) in respect of local purpose reserves**
>
> (1) The administering body of a local purpose reserve may, in the exercise of its functions under section 40, do such things as it may from time to time consider necessary or desirable for the proper and beneficial management, administration, and control of the reserve and for the use of the reserve for the purpose specified in its classification.

[40] It argued that it was irrelevant that at that time the Department of Conservation had declined to grant certain easements.

[41] Section 61(1) has to be read in association with s 48(1). Even read alone, the use of the reserve for washing down boats is not for the purpose specified in its classification.

[42] In short, the resolution of the Council on 30 August 2014 was misconceived and in error of law. It has no effect. To the extent it ever had any effect it is quashed.

Second Cause of Action: Review of the 5 June 2015 Decision

[43] On 5 June 2015, FNDC pursuant to the instrument of delegation from the Minister of Conservation (dated 12 June 2013), reconsidered the decision of the Northland Conservator of August 2013 to refuse certain easements. The first defendant as the delegate of the Minister of Conservation resolved to consent to the easements in favour of Doug's Opua Boatyard which had not been consented by the Northland Conservator on a point of law. That point of law had been overturned by the High Court in the judgment of Heath J. The reason for the resolution was as follows:

> The judgment of Justice Heath clarifies the law and confirms that Council, as the Minister of Conservation's delegate, has the jurisdiction to reconsider the easements previously not granted by the Department of Conservation (DoC).
>
> The Conservator of Northland had considered the matter and found the process followed on the whole as satisfactory and on that basis some of the easements were granted. Others were refused on the basis of lack of jurisdiction.
>
> … Council, as the Minister's delegate, has considered some of those objections [from "Tangata Whenua"] in the light of the easements to be reconsidered and there appears to be no basis to refuse the easements to give effect to the resource consent held by Mr Schmuck.

[44] These were the four easements (numbered here to reflect their original numbering):

> 3. The construction and maintenance of a concrete washed down area with associated discharge containment systems to be located above a line 10 metres above mean high water.
>
> 4. The washing down of boats prior to the boats being moved to the boatyard for repairs or maintenance or being returned to the water.
>
> 5. The erection of screens or the implementation of similar measures to contain all contaminants within the wash down perimeter.
>
> 6. The repair or maintenance of any vessel which by virtue of its length or configuration is unable to be moved so that it is entirely within the adjacent boatyard property.

[45] Altogether these four were to be treated as an easement over Section 2 SO68634 as shown on NRC Map 3231b (attached to this judgment) and Williams & King Plan Sheet no. 03.11. Secondly, the FNDC consented to an easement two metres wide over Sections 2 and 3 SO68634 as shown on the same map and as shown as Area B on the Williams & King Plan Sheet no. 03.11 to permit:

> Access to and repair and maintenance of any vessel standing on the southern slipway tram rail and/or turntable.
>
> (d) An easement over Section 1, 2, 3 and 4 of SO68634 as shown on NRC Map 3231b on Williams & King Plan Sheet no. 03.11 to permit:
>
> 1. The discharge of contaminants to air, soil and water in accordance with any relevant resource consent.
>
> 2. The emission of noise in accordance with any relevant resource consent.

[46] I refer to the easements mentioned in the paragraphs above simply as "the easements".

The Pleadings

[47] The principal pleadings in relation to this decision are as follows:

(a) The activities and the occupation of the Reserve to the extent authorised by the easements are not authorised by the Reserves Act;

(b) On the contrary, they are inconsistent with the purposes of the Reserves Act and the purpose of esplanade reserves;

(c) The FNDC failed to consult with local iwi before making the second decision;

(d) The FNDC made significant changes to the Walls Bay Management Plan without further public consultation; and

(e) In the second decision the FNDC took into account irrelevant considerations and failed to take into account relevant considerations.

[48] Particulars of the irrelevant considerations are pleaded as follows:

- The boatyard submission that it had existing use rights over the Reserve when the boatyard was purchased in 1994;

- The boatyard submission that its economic viability required areas of the Reserve for commercial boatyard activities;

- The boatyard submission that the contaminant containment system and concrete wash down area could not be accommodated on land adjacent to the Reserve owned by the boatyard;

- That the resource consent obtained by Doug's Opua Boatyard was sufficient reason for granting easements over the Reserve; and

- The expense incurred by the first defendant in dealing with the application for easement by Doug's Opua Boatyard over 20 years.

[49] The particulars of failure to take into account relevant considerations were:

- The interests of the public;

- The local community interest in maintaining the Reserve for the purposes for which it was classified;

- That the easements granted were not publicly notified pursuant to s 119 of the Reserves Act;

- That no submissions had been sought from the public on the easements granted pursuant to s 120 of the Reserves Act;

- That the area of the Reserve adversely affected was significantly expanded by increasing the width of the slipway corridor and the boatyard use on Area B of NRC Plan A3231b; and

- That significant changes were made to the Walls Bay Management Plan without further public consultation.

[50] This led to the plaintiff's conclusion that the first defendant erred in law in consenting to the easements for the following reasons:

- Private commercial boatyard activities are not a purpose specified in ss 48(1) and 48A(1) of the Reserves Act;

- Construction on the Reserve of a contaminant containment system, concrete wash down area and screens is inconsistent with the purposes of the Reserves Act;

- As the Northland Conservator was the original decision-maker pursuant to an instrument of delegation dated 10 March 2004, at the time of the original application that the easement was made, the decision was for the Northland Conservator, not the first defendant; and

- That the FNDC had pre-determined the matter, having already decided in October 2014 to grant permission.

[51] It was also pleaded that the decision was in all circumstances unreasonable in the sense that no reasonable decision-maker would make it and it is thereby flawed. The particulars of that were:

- The decision effectively excluded public and community activity on the Reserve;

- The private commercial boatyard activities should take precedent over the public and local community interests in the Reserve; and

- The boatyard has an area of its own immediately adjacent to the Reserve that it is suitable for a contaminant containment system and concrete wash down.

[52] The core submission is that there is no legitimate reason for these permanent facilities to be built on the Reserve rather than on the boatyard land.

[53] The decision increased the area that permitted boatyard activity beyond the original resource consent, significantly expanding the area of the Reserve adversely affected, by increasing the width of the slipway corridor in the boatyard use of Area B on NRC Map 3231b.

Analysis of the 5 June 2015 Decision

[54] A general comment can be made at the outset that the position taken in these proceedings is a challenge to the Heath J's judgment in the High Court, as much as it is to the decision making of the FNDC and the Ministry of Conservation.

[55] Embedded in these pleadings is a different value ascribed to esplanade reserves than that reflected by the judgments of the Environment Court, the local authority, the Minister of Conservation, the High Court and as I will endeavour to show, by Parliament, as expressed in the Reserves Act. The values underpinning the pleadings, that I have set out, presume that esplanade reserves should as far as possible be utterly natural, and with no commercial activity taking place on them.

[56] This is a cultured view of nature. If that site was utterly natural, it would be difficult to walk through it, let alone sit on the grass and admire the view. It is reached by an artificially-formed track. It forms a groomed embankment. It has a small park-like character. It is an environment that has been modified by man.

[57] The Court takes notice of the notorious fact that New Zealanders value access to the coastline at any point along the coastline. There is a deep hostility to the concept that foreshores should be private property as one often finds in Europe. Secondly, there is often a public association with reserves being land for public use without any structures thereon. This view suppresses or maintains obliviousness to the fact that most reserves in fact are modified by man so as to provide amenities to the people using them.

[58] As I repeatedly mention, one of the functions of coastal reserves obvious to all is to provide access to the sea, not just for swimming but also for boating, be it in small kayaks or in yachts and motor boats. The latter need to be pulled out of the water and regularly serviced.

[59] The overall context in New Zealand is a degree of pragmatic use of the coastline not only for the enjoyment of the coastline itself, but as the means of access to the sea. This needs to be married to a frequent acquaintance with a degree of

pragmatism by both users of reserves and democratic representatives of users who hold office in Councils, such as the FNDC.

[60] In these proceedings, there has been no direct challenge to the use of the private land as a boatyard. Nor has there been any direct challenge to the presence of a slipway and turntable enabling boats to be pulled out of the water and up onto the boatyard.

[61] The operations on the boatyard are clearly compatible with families or couples picnicking on the Reserve and swimming off the little beach at Walls Bay. The easement titled Area B on NRC Map 3231b is two metres wide. Practically, it is simply a strip of ground immediately adjacent to the boundary of the private property and exists so that a vessel sitting on a frame in the private property can be washed on its northern side by someone standing on the edge of the Reserve. As NRC Map 3231b shows, Area B is a very small fraction of what is a relatively small stretch of esplanade reserve. It does not in any practical sense impede use of the Reserve. It has been objected to as a point of principle. The principle articulated several times during the hearing by counsel is that there should be no commercial activity on a reserve. That this was somehow some sacrosanct principle. It is not a principle one finds in the Reserves Act. It is a political viewpoint which is not reflected in the statute.

[62] The long title of the Reserves Act 1977 is as follows:

> An Act to consolidate an amend certain enactments of the Parliament of New Zealand relating to public reserves, to make further provision for their acquisition, control, management, maintenance, preservation (including the protection of the natural environment), development and use, and to make provision for public access to the coastline and the countryside.

[63] It is a phenomenon of environmental legislation that a collection of values are pursued by the statutes. On application, some values have to give way to other values. For example, the protection of the natural environment may have to give way to some development or use. Making provision for public access to the coastline may require some alteration of the natural environment.

[64] This does not mean that environmental statutes are incoherent. Rather, what happens is that environmental issues are resolved by giving preference in particular factual context to some values over other values. That may appear to be arbitrary, and can be. But normally, if the decision is informed by the overall objects and goals of the statute, values relevant to the facts that are articulated in provisions of the statute come naturally to the fore, and it can be a principled exercise of discretion in a particular context to support one value over another. Take, for instance, preservation and protection of the natural environment, alongside provision for public access to the coastline and countryside. Let us assume (quite properly) that New Zealand's coastline starts as a natural environment. The construction of a pathway, whether it is in a national park at the top of the South Island or here, is artificial. It has destroyed some of the natural environment but provides public access to the rest of the natural environment and countryside. In that way it is not incoherent for the long title to talk in one sentence of preservation on the one hand, and development on the other. And in such statutes there is always room for reasonable people to disagree.

[65] Accordingly, the persons behind the applicant incorporated society can quite rationally and in a sense reasonably have a different opinion as to how they would resolve the compatibility and aspects of incompatibility of the boatyard with the Reserve, without either point of view being wrong. This fact is an important consideration to keep in mind when adjudicating to ascertain whether or not there is error, such that this Court should intervene and set aside a Government decision.

[66] The long title of the Reserves Act falls to be read against s 3 of the Act, headed "General Purpose of this Act". Of particular relevance to this case is s 3(1)(c):

> **3 General purpose of this Act**
>
> (1) It is hereby declared that, subject to the control of the Minister, this Act shall be administered in the Department of Conservation for the purpose of—
>
> …
>
> (c) ensuring, as far as possible, the preservation of access for the public to and along the sea coast, its bays and inlets and offshore islands,

> lakeshores, and riverbanks, and fostering and promoting the preservation of the natural character of the coastal environment and of the margins of lakes and rivers and the protection of them from unnecessary subdivision and development.

[67] Mr Mark submitted that all reserves must be maintained for public purposes and in particular for the public purposes expressed in s 3(1) and that there is no reference anywhere in that section to private commercial purposes. He cited in support the decision of Baragwanath J in *Friends of Turitea Reserve Society Inc v Palmerston North City Council.*[7] However, I consider the pragmatic approach outlined above to be consistent with Baragwanath J's discussion of the factual matrix and social context that must be examined when interpreting the Reserves Act.[8]

[68] Mr Mark also relied on s 23 of the Act which is on the subject of "local purpose reserves", emphasising s 23(2):

> **23 Local purpose reserves**
>
> …
>
> (2) It is hereby further declared that, having regard to the specific local purpose for which the reserve has been classified, every local purpose reserve shall be so administered and maintained under the appropriate provisions of this Act that—
>
> (a) where scenic, historic, archaeological, biological, or natural features are present on the reserve, those features shall be managed and protected to the extent compatible with the principal or primary purpose of the reserve:
>
> provided that nothing in this paragraph shall authorise the doing of anything with respect to fauna that would contravene any provision of the Wildlife Act 1953 or any regulations or Proclamation or notification under that Act, or the doing of anything with respect to archaeological features in any reserve that would contravene any provision of the Heritage New Zealand Pouhere Taonga Act 2014:
>
> provided also that nothing in this paragraph shall authorise the doing of anything with respect to any esplanade reserve created under section 167 of the Land Act 1948, or section 190(3) or Part 25 of the Municipal Corporations Act 1954 or Part 2 of the Counties Amendment Act 1961 and existing at the commencement of this Act, or any local purpose reserve

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7 *Friends of Turitea Reserve Society Inc v Palmerston North City Council* [2008] 2 NZLR 661 (HC).

8 For example, "It is therefore necessary to stand back and examine the role that community reserves play in New Zealand law" (at [16]) and Baragwanath J's analysis at [23]-[25].

> for esplanade purposes created under the said Part 25 or Part 2 or under Part 20 of the Local Government Amendment Act 1978 or under Part 10 of the Resource Management Act 1991 after the commencement of this Act, that would impede the right of the public freely to pass and repass over the reserve on foot, unless the administering body determines that access should be prohibited or restricted to preserve the stability of the land or the biological values of the reserve:
>
> (b) to the extent compatible with the principal or primary purpose of the reserve, its value as a soil, water, and forest conservation area shall be maintained.

[69] He submitted that:

> Nowhere does the Act expressly authorise the granting of "permissions" to carry out private commercial activity on esplanade reserves in lieu or instead of leases, licences and easements to overcome the restraints relating to such instruments as specified in the Act.

[70] He submitted that the words "any other purpose" in s 48(1)(f) should take their colour from the surrounding words. That accordingly, any other purpose means a purpose connected with access, water or drainage for land not forming part of the reserve.

[71] This obviously is a challenge to the decision of Heath J. He is essentially arguing for the principle of interpretation called "ejusdem generis".[9]

[72] I do not agree the language "or for any other purpose" expressly allows a purpose which does not limit the purpose to access supply of water or drainage of land. Mr Mark submitted that s 48(1) being broadly focussed on rights of ways or easements for conveyance of subject matter across the reserve, supports the submission "that these private commercial boatyard activities are not intended to be authorised under s 48(1)" — that s 48(1)(b)(c) clearly support the view that the right of way or easement must be for some sort of movement or conveyance, as they refer to access" and the "distribution or transmission" of certain subject matter.

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[9] Also known as the "limited class rule", it is described in Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 254 as: "really a subclass of noscitur a sociis. It relates to a common drafting practice: the list of specific words followed by a "catch-all" general word. The rule provides that if the specific words in the list are of the same class, the general word following them is construed as also being limited to that class."

[73] I am not persuaded by this argument. The relevant parts of s 48(1)(f) can be read to provide access to other land not forming part of the reserve. It encompasses the grant of an easement facilitating access to other land not forming part of the reserve for any purpose connected with that land.

[74] On that interpretation, the cleaning of the hulls of slipped vessels or the maintenance of such vessels while resting on the slipway, is purposeful activity connected with the operations of the boatyard on the adjacent private property. Moreover such a benefit can be understood in common law terms as an easement on that part of the reserve covered by the slipway to the advantage of the adjacent private property upon which is located the boatyard business.

[75] Mr Mark argued it cannot have been Parliament's intention to create such a broad power in s 48(1)(f) when the powers in relation to the granting of leases, licences and other easements are expressly constrained. He submitted:

> The "permissions" granted in October 2014 and the easements granted in June 2015, authorising the washing down of boats on the reserve, including construction of wash down and containment facilities, the erection of screens around this work, and the repair and maintenance of boats on the reserve do not promote or comply with the express purposes of the Reserves Act with respect to the local purpose (esplanade) reserve at Walls Bay, Opua. Both decisions therefore exceed the statutory decision making powers and the decision maker erred in law.

[76] Heath J in his decision, having found that the Minister's delegate, the Conservator, was in error of law to rule out a number of proposed easements, gave as relief a direction that the granting of those easements be reconsidered.

[77] It is important to note that that reconsideration was a reconsideration of the issue as to whether or not the grant of such easements was "with the consent of the Minister and on such conditions as the Minister thinks fit".[10] In the intervening time between the Conservator's rejection of those easements and the judgment of Heath J, the Minister had delegated his power to consent to District Councils across New Zealand, including the FNDC. This extraordinary decision meant in this case that the FNDC, as delegate of the Minister, had to consider whether or not to consent to

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[10] Section 48(1).

the decision of the FNDC as administering body and also had the power to impose conditions on the aforesaid decision as the FNDC thought fit. In the letter from the Department of Conservation to the District Councils of New Zealand, explaining the delegation, the Department observed:

> There is an expectation that local authorities will maintain a distinction between their role as the administering body of a reserve and their role as a delegate of the Minister.

[78] The claim in this case does not seek to impugn that decision by the Minister, which as I have said was a nationwide decision. It was a decision accompanied by advice that the function of the consent of the Minister was not to reconsider the decision of the administering body but was a check to review whether the administering body had properly followed the requirements of the Act in reaching its decision. In that sense, no doubt the reasoning was that, where the administering body is the same as the delegate of the Minister, it is still possible for the administering body to take a step back and go through a checklist to ensure that it has followed all procedures and if not, adjust the decision accordingly.

[79] Within the scope of local government decision making, this can be done by, for example, getting a separate official or set of officials from those engaged in exercising the Council's powers administering body to check compliance. It was not pleaded and would have been beyond the scope for practical purposes of these very local proceedings to have challenged (as being without jurisdiction) the delegation of the Minister of the consent function in s 48(1) to the local district councils.

[80] Accordingly, the consent that was given after the decision by Heath J has to be examined as a consent of the Minister, as Mr Brown for the third defendant emphasised.

[81] As such, recognising that step also resolves an important argument by Mr Mark for the plaintiff. He submitted that the reconsideration requirement imposed by Heath J warranted a re-advertising of the application and a fresh consideration with the benefit of any further submissions for and against by the Council.

[82] Mr Brown pointed out that the requirement of s 48(1) for the consent of the Minister is, as I have just pointed out, a check, not a full consideration starting again as it were. That is the way it is presented in the internal advice within Government, and in my view, that is the correct interpretation of the relationship between the powers vested in the administering body and the powers vested in the Minister or the Minister's delegate in s 48(1).

[83] The consequence of this reasoning is that to succeed the plaintiff must be able to impugn the original reasoning of the administering body by finding an error which should have been picked up in the review by the Minister's delegate. There are a number of arguments which I will note and answer.

[84] Mr Mark argues that the grant of easements had to conform with the scope of the resource consents granted under the RMA, and in that regard there was an adjustment of the boundaries of the easement creating an additional area of 60 square metres.

[85] It will be recalled that grants of easements under s 48(1) are subject to subs (2) and to the RMA. The words in s 48(1) do not require easements to exactly match the RMA consents. This is a very minor inconsistency with the RMA consents. I do not think that the lack of a precise match between the easements and the RMA consents is an area in error which makes illegal the grant of the easements. If need be, there are powers under the RMA to amend resource consents.[11]

[86] Mr Brown for the third defendant argues that there was no legal significance in the differences between areas of the easements in the plan before the Environment Court and the plan for the purposes of the s 48 easement (respectively Plan 3231.b and Plan 03.11.). He submits that while the easements may extend over an area larger than Area A on NRC Plan 3231.b, the conditions of the resource consent

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[11] For instance, s 221(3) of the Resource Management Act 1991 provides:

> (3) At any time after the deposit of the survey plan,—
> **(a)** the owner may apply to a territorial authority to vary or cancel any condition specified in a consent notice:
> **(b)** the territorial authority may review any condition specified in a consent notice and vary or cancel the condition.

govern the operation of the boatyard. Area A on Plan 3231.b continues to denote the limits of the area of the reserve on which boats can be washed down, repaired or maintained.

[87] There has been no amendment or expansion of Area A by virtue of the easement application. Grant of a new resource consent or an amendment to the existing consent is required before Mr Schmuck may use any part of the Reserve outside Area A to wash down, repair or maintain boats.

[88] That submission is consistent with my own aforesaid reasoning with my reference that there can if need be, be an application to the Environment Court for an adjustment of the RMA consents in order to have a precise match with the extent of the easement. But it is not a vitiating difference.

[89] For all these reasons there was no requirement on the Council to re-advertise the application for easements after the decision of the High Court, Heath J. The FNDC's decision, as delegate of the Minister, to consent to the easements which have been held to be capable of being granted validly by Heath J, has not been impugned.

Conclusion

[90] Based on the reasoning above, I make the following conclusions:

(a) The FNDC's decision of 30 October 2014, granting "permission" to carry out private commercial boatyard activities on the Reserve was in error of law. I quash that decision.

(b) The FNDC's decision of 5 June 2015 was not in error of law. It has not been impugned and still stands.

[91] Costs are reserved.